



November 30, 2017

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: FOIA Request for Records Regarding Description of State Plans for the Provision of Drinking Water Under Emergency Circumstances Pursuant to Safe Drinking Water Act

Dear FOIA Officer:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable Environmental Protection Agency (EPA) regulations at 40 C.F.R. §§ 2.100-2.406.

I. Description of Records Sought

Please produce records¹ as described below in EPA's possession, custody, or control related to compliance by California, Florida, Louisiana, Michigan, New Jersey, New York, Ohio, Puerto Rico, Texas, U.S. Virgin Islands, and West Virginia with the Safe Drinking Water Act (SDWA) requirement that states with primary enforcement responsibility have "[a]dopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances including earthquakes, floods, hurricanes, and other natural disasters, as appropriate," 42 U.S.C. § 300g-2(a)(5), including but not limited to:

- A. EPA guidance regarding emergency planning for provision of drinking water under emergency circumstances including revisions to or communications regarding the Guidelines for Preparation and Review of the State Emergency Plans dated October 29, 1976 and the Revised Guidelines for Approval of State

¹ "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any EPA office, including, but not limited to, EPA Headquarters offices, and specifically including EPA regional offices in possession of responsive records. For example, the requested records involving New York, New Jersey, Puerto Rico, and the U.S. Virgin Islands may be in the Region 2 Office; records involving West Virginia may be in the Region 3 Office, etc.

Programs for Primary Enforcement Authority Under Subpart B of the Safe Drinking Water Act dated November 1998;

- B. The original applications and any subsequent revisions to those applications submitted to EPA by California, Florida, Louisiana, Michigan, New Jersey, New York, Ohio, Puerto Rico, Texas, U.S. Virgin Islands and West Virginia, seeking primary enforcement responsibility under the Safe Drinking Water Act, 42 U.S.C. § 300 et seq., including the “brief description of the State’s plan for the provision of safe drinking water under emergency conditions.” 40 C.F.R. § 142.11(a)(5);
- C. EPA guidance regarding its annual compliance reviews of primacy agencies under the SDWA pursuant to 40 C.F.R. § 142.17(a)(1); and
- D. EPA’s annual compliance reviews since 2010 of the primacy agencies under the SDWA in California, Florida, Louisiana, Michigan, New Jersey, New York, Ohio, Puerto Rico, Texas, U.S. Virgin Islands, and West Virginia, including EPA’s assessment of whether the primacy agency has the ability to provide safe drinking water under emergency conditions. *See* 40 C.F.R. § 142.17(a)(1).

Please either email responsive records to me at jsonnenfeldt@nrdc.org, or email me to request a link to a Dropbox folder where you can upload the records. Please release responsive records to me on a rolling basis. If you determine that any of the records I’ve described above are already publicly available, please let me know where to find them.

II. Request for a Fee Waiver

NRDC requests that EPA waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 40 C.F.R. § 2.107(c)(1)(iii).

A. NRDC Satisfies the First Fee Waiver Requirement

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40

C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to evaluate the first fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

1. Subject of the request

The records requested here involve EPA's compliance with and enforcement of the SDWA requirement that states with primary enforcement responsibility under the SDWA have "[a]dopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances including earthquakes, floods, hurricanes, and other natural disasters, as appropriate." 42 U.S.C. § 300g-2(a)(5); 40 C.F.R. § 142.11(a)(5). The requested records thus directly concern "the operations or activities of the government." 40 C.F.R. § 2.107(l)(2)(i).

2. Informative value of the information to be disclosed

The requested records are "likely to contribute to" the public's understanding of government operations and activities, 40 C.F.R. § 2.107(l)(2)(ii). The public does not currently possess comprehensive information regarding the extent to which EPA is ensuring that states with primary enforcement responsibility under the SDWA are, as required by SDWA section 1413(a)(5), ready and able to provide drinking water in emergency circumstances. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

3. Contribution to an understanding of the subject by the public is likely to result from disclosure.

Because NRDC is a "representative of the news media," as explained in Part II.C below, EPA must presume that this disclosure is likely to contribute to public understanding of its subject. 40 C.F.R. § 2.107(l)(2)(iii). Even if NRDC were not a media requester, its expertise in safe drinking water, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—show that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is accordingly a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC's more than three million members and online activists are "a broad audience of persons interested in the subject" of provision of safe drinking water under emergency

circumstances, 40 C.F.R. § 2.107(l)(2)(iii). When this group is combined with the other audiences for the numerous publications and other platforms to which NRDC contributes, the likely audience of interested persons to be reached is certainly “reasonably broad.” 40 C.F.R. § 2.107(l)(2)(iii).

NRDC can disseminate newsworthy information collected through this FOIA request to its members, online activists and other members of the public through many channels, free of charge. As of summer 2017, these channels include:

- NRDC’s website, <http://www.nrdc.org> (sample homepage at Att. 1), is updated daily, features blogs by NRDC’s scientific, legal, and other staff experts, and draws approximately 1.3 million page views and 510,000 unique visitors per month.
- NRDC’s Activist email list includes more than three million members and online activists who receive regular communications on urgent environmental issues. (sample at Att. 7) This information is also made available through NRDC’s online Action Center at <https://www.nrdc.org/actions> (Att. 8).
- NRDC updates and maintains several social media accounts with tens to hundreds of thousands of followers. Its major accounts include Facebook (906,992 followers) (Att. 2), Twitter (271,551 followers) (Att. 3), Instagram (108,315 followers) (Att. 4), YouTube (Att. 5), and LinkedIn (Att. 6).
- NRDC also is a regular contributor to Medium (1,478 followers) (Att. 9) and the Huffington Post (Att. 10).

NRDC staff also write papers and reports; provide legislative testimony; present at conferences; direct and produce documentary films; and contribute to national radio, television, newspaper, magazine and web stories and academic journals. Some examples of these contributions include:

- Article, “Interior Department worked behind the scenes with energy industry to reverse royalties rule,” *Wash. Post*, Oct. 6, 2017 (discussing documents obtained through a FOIA request submitted by NRDC and quoting NRDC Senior Policy Advocate Theo Spencer) (Att. 12);
- Documentary, *Sonic Sea* (2016), featured on the Discovery Channel (directed and produced by NRDC Deputy Director of Communications Daniel Hinerfeld) (Att. 13);
- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 14);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate

- Poole and Senior Policy Analyst Ed Osann) (Att. 15); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 16);
- Congressional testimony, David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 17);
 - Conference brochure, “World Business Summit on Climate Change,” May 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 18);

NRDC’s legal, scientific, and other experts have a history of using information obtained through FOIA requests to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. For example:

1. NRDC recently obtained through FOIA and publicized emails between the Trump transition team and industry officials regarding reversal of Obama-era preliminary restrictions on the proposed Pebble Mine. This cast light on an issue of considerable public interest. *See, e.g.*, Kevin Bogardus and Dylan Brown, “Homework assignment’ — how Pebble lobbied Trump’s EPA,” *E&E News*, June 8, 2017 (Att. 30).
2. In April 2014, NRDC used FOIA documents to prepare a report on potentially unsafe chemicals added to food, without FDA oversight or public notification. The report, *Generally Recognized as Secret: Chemicals Added to Food in the United States*, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 28). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” *Wash. Post*, Apr. 7, 2014 (discussing report) (Att. 29).
3. NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. NRDC used these documents to publish a January 2014 report, titled *Playing Chicken with Antibiotics*, that reveals decades of FDA hesitancy to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” *Reuters*, Jan. 27, 2014 (discussing report) (Att. 27).
4. NRDC has used White House documents obtained through FOIA and other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure. *See Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States*, <http://www.nrdc.org/health/atrazine/files/atrazinel0.pdf> (Apr. 2010) (update to 2009

report) (Att.24). *See also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” *Harper’s Magazine*, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 25).

5. NRDC scientists have used information obtained through FOIA to publish analyses of the United States’ and other nations’ nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States’ plans to deploy a ballistic missile system and the implications for global security. Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, “The Protection Paradox,” *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 23).
6. Through FOIA, NRDC obtained an ExxonMobil memorandum advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration’s decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, “Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel,” Apr. 3, 2002 (Att. 21). *See also* Elizabeth Shogren, “Charges Fly Over Science Panel Pick,” *L.A. Times*, Apr. 4, 2002, at A19 (Att. 22).
7. Through FOIA and other sources, NRDC obtained information on levels of arsenic in drinking water nationwide and used it in a report, *Arsenic and Old Laws* (2000) (Att. 19). The report explained how interested members of the public could learn more about arsenic in their own drinking water supplies. *Id.* *See also* Steve LaRue, “EPA Aims to Cut Levels of Arsenic in Well Water,” *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC’s report) (Att. 20).

In short, NRDC has proven its ability to digest, synthesize, and quickly disseminate to a broad audience newsworthy information gleaned through FOIA requests like this one.

4. Significance of the contribution to public understanding

The records requested shed light on a matter of considerable public interest and concern: the ability of states with primary enforcement authority to provide safe drinking water under emergency circumstances. Recent events in multiple states and territories highlight increasing risks to water supplies:

- Flint, Michigan was without safe drinking water for over 18 months after the city switched to a more corrosive water source that caused lead to leach from old pipes and fixtures into the water supply at staggering levels. *See, e.g.* Associated Press, “Flint

- water crisis: expert says lead levels normal but warns against celebration,” *The Guardian*, Sept. 15, 2017;
- One month after Hurricane Maria hit Puerto Rico, nearly 1 million people, over a third of the territory’s population, lacked access to safe drinking water. John D. Sutter, “One month without water in Puerto Rico,” *CNN*, October 20, 2017;
 - 48 communities in Florida were under boil water notices after Hurricane Irma due to ruptured pipes or damaged sewer lines. Mary Ellen Klas, “After Irma, is your water safe to drink? You might have to boil it.” *Miami Herald*, Sept. 12, 2017;
 - In December 2015, after more than a year of community complaints and concern, EPA advised the residents of Hoosick Falls, New York not to drink water from the public supply due to contamination with perfluorooctanoic acid. See Dan Turkel, “Officials took months to warn residents of a tiny New York village of an impending disaster in their water supply,” *Business Insider*, Mar. 5, 2016;
 - Severe droughts in California left thousands in the Central Valley without running water for months. Julia Lurie, “California’s Drought Is So Bad That Thousands Are Living Without Running Water,” *Mother Jones*, July 31, 2015;
 - In 2014, a chemical spill into the Elk River in West Virginia jeopardized drinking water resources for 300,000 people and left some areas without access to safe drinking water for over a week. See Trip Gabriel, “Thousands Without Water After Spill in West Virginia,” *N.Y. Times*, Jan. 10, 2014; James Gerken, “On the Anniversary of the Elk River Chemical Spill, West Virginians Tell Their Stories,” *HuffPost*, Jan. 9, 2015;
 - Increasingly frequent toxic algal blooms in Lake Erie have threatened drinking water for hundreds of thousands of people. For example, in 2014 Toledo issued a tap water ban to nearly half a million people. See Jane Lee, “Driven by Climate Change, Algae Blooms Behind Ohio Water Scare Are New Normal,” *National Geographic*, Aug. 6, 2014;
 - The 100,000 residents of Beaumont, Texas were without safe drinking water for over a week after Hurricane Harvey. Elliott McLaughlin, “In Beaumont, water receding, but not a drop to drink,” *CNN*, Sept. 6, 2017; and
 - In New Jersey, Superstorm Sandy “damaged more than 100 facilities supplying drinking water to residents and sewage treatment plants, leaving the state with an unexpected \$2.6 billion bill to repair, rebuild, and make the systems more resilient.” Tom Johnson, “Hurricane Sandy Leaves State With \$2.6b Tab for Water Infrastructure,” *NJ Spotlight*, Apr. 10, 2013.

The requested information would shed light on the plans various states have in place to ensure provision of safe drinking water in emergency circumstances, such as the storms, droughts, and accidents listed above. Additionally, the information would inform the public about EPA’s role in ensuring that states and territories meet the requirements for primacy under the SDWA.

B. NRDC Satisfies the Second Fee Waiver Requirement

Disclosure of the requested records would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1), (3). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); see *Natural Res. Def. Council v. United States Env’tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the extent to which EPA is ensuring that states with primary enforcement responsibility under the SDWA are, as required by SDWA section 1413(a)(5), ready and able to provide drinking water in emergency circumstances. Disclosure of the requested records will contribute significantly to public understanding of plans to provide safe drinking water under emergency circumstances and associated threats to human health.

C. NRDC Is a Media Requester

Even if NRDC were not entitled to a public interest waiver of all costs and fees, it would be a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and EPA’s FOIA regulations, 40 C.F.R. § 2.107(c)(1)(iii); see also 40 C.F.R. § 2.107(b)(6) (defining “[r]epresentative of the news media”). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep’t of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 11) (granting NRDC media requester status).

NRDC is in part organized and operated to gather and publish or transmit news to the public. For example, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. As explained in Part II.A, NRDC also publishes a regular newsletter for its more than three million members and online activists. See 40 C.F.R.

§ 2.107(b)(6) (“Examples of news media include . . . publishers of periodicals.”). NRDC also maintains a significant additional communications presence through its staff blogs on www.nrdc.org, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. See OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). These and the other communications channels referenced earlier in this letter routinely include information about current events of interest to the readership and the public. NRDC employs more than fifty specialized communications staff, including accomplished journalists and editors, and numerous other advocates able to disseminate, through these and other channels, newsworthy information acquired through FOIA.

Organizations with NRDC’s characteristics “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union); see also *Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”).

III. Willingness to Pay Fees Under Protest

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with EPA’s FOIA regulations at 40 C.F.R. § 2.107(c)(1)(iv) for all or a portion of the requested records. See 40 C.F.R. § 2.107(l)(4). Please contact me before doing anything that would cause the fee to exceed \$250. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

IV. Conclusion

Thank you for your help. Please call or email me with questions.

Sincerely,

A handwritten signature in cursive script that reads "Joya Sonnenfeldt".

Joya Sonnenfeldt*
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**J.D./M.E.M. not yet admitted to the bar*

Enclosures (sent via FOIA Online):
Attachments 1 through 30 (single .pdf file)